

DEPARTMENT OF STATE
RESPONSES TO BUDGET BRIEFING QUESTIONS

Hearing before the Joint Budget Committee
November 15, 2007
1:30 p.m. - 3:00 p.m.

1:30 – 1:40

Introductions and General Overview

1:40 – 1:50

Departmental Goals and Objectives

- 1) What are the Department of State's principal goals and objectives? What are the metrics by which you measure success or failure?**

Response:

The Department's principle goals are to serve the public by receiving and communicating information, particularly with the use of technology, and improving the administration of elections. Major objectives include:

- Decreasing the number of paper documents filed with the department;
- Achieving more strict compliance with agency policies regarding information security standards;
- Increasing the number of registered charitable organizations that are required to register with the Department;
- Increasing the number of election officials trained in all aspects of elections;

Performance Measures for these objectives include:

- the number of paper documents processed;
- the number of transactions filed on-line;
- the percentage of staff achieving a passing grade on a cyber security awareness exam;
- number of registered charitable organizations
- number of election officials trained

- 2) Given the change in the Administration, have there been any changes to your department's principal goals and objectives since last year?**

Response:

The Department continues its aims to serve the public through use of technology by recording and communicating information, and to work toward ensuring the integrity of elections in the state. The new administration seeks to focus its efforts and resources on these core goals, while placing less emphasis on programs that do not serve those goals.

3) What progress did you make during the last year in achieving your goals?

Response:

The Department continues to web-enable documents which constituents are required to file with the state and to add web-based applications, such as a recent one for persons to register online to become a notary public. The Department also implemented rules regarding campaign finance, voting equipment certification, and security issues surrounding elections, and began an intensive voting equipment certification program. The Department rolled out the SCORE voter registration system to nine pilot counties and launched a major initiative to redesign its campaign finance filing and reporting system. The Secretary of State convened several task forces: to examine issues related to military overseas voting; to examine election-related issues facing the disability community; to examine campaign and political finance issues; and to examine ways to increase donor confidence in charitable organizations.

4) How is the additional money provided to your department in FY 2007-08 being used to achieve your goals? What improvements is your department making in its outputs?

Response:

Under S.B. 07-259, the Department received funding to redesign the campaign finance filing system; this project is in its early stages. During the current fiscal year, the Department is concentrating on making relatively easy but significant improvements to the existing system. In the next fiscal year, the Department will be engaged in rewriting the filing and reporting system to better serve the public's needs.

In addition, the Department is developing the new Address Confidentiality Program in accordance with HB 07-1350, utilizing appropriations for such purpose, even though the revenues are slow in coming in to support the program.

5) Please identify your department's 3 most effective programs and your 3 least effective programs. Explain why you identified them as such. Explain how your most effective programs further the department's goals.

Response:

The Department has several effective programs. Its on-line business filing program enables persons/businesses to file and access documents 24/7 at a substantially reduced fee, which is much more efficient for the public and the state than paper filings. The revenues generated, even at the lower rates for on-line filings, support most of the department's functions. The

Department's Information Technology Division supports all the business applications as well as other on-line functions of the department. In addition, it provides oversight for the Disaster Recovery Center, which has the capability to serve as the technological back-up for all state agencies in the event of a major disaster; while not all state agencies are participating, many are using this facility. With federal grant funds provided under the HAVA, our accessibility of polling places grant program provides grants to counties to improve accessibility of polling places for the disabled voters. In addition to benefiting the disabled community, the counties – particularly rural ones – can make needed improvements without having to use limited county resources.

There are some programs within the Department of State that have become problematic. The bingo-raffle program which oversees charitable gaming has noted a decline in charitable bingo and revenues generated by such gaming occasions. This program has not been as self-supporting as statute intends, resulting in an increase in fees to licensees. The department believes this program might be more effective if it is grouped with other gaming programs in the Department of Revenue, which has compliance oversight of non-charitable bingo in casinos.

The department has experienced a steady increase in the number of registered charitable organizations and an increased number of complaints filed with our Charitable Solicitations program. However, there are not enough resources available to effectively investigate unscrupulous organizations operating in the state under this important program; in addition, the Department does not have enforcement powers to shut down or sanction such organizations.

Currently, a large amount of resources are being devoted to implementation of our voting equipment certification program with many variables outside the department's control: equipment vendor cooperation; statutory requirements; current and expected litigation; inadequate documentation of federal equipment certification, etc. The trend is changing toward increasing federal testing and documentation of federal requirements. As this trend continues, and as states rely more on federal or national certification, the Department's functions regarding certification would change and resources would diminish significantly. Although most states rely solely on federal certification by the Election Assistance Commission (EAC) or national certification by the National Association of State Election Directors (NASD), the implementation of our security requirements, including the trusted build of voting system software, relies heavily on our certification process. If the benefit of a trusted build of a voting system is large enough to prove to anyone that the voting system software hasn't changed (which is a direct output of certification) the program's effectiveness will be realized.

- 6) Are there programs that your department is required to perform that do not further your department's goals or have outlived their usefulness? If so, what are they and by whom are they required? Why don't they further your department's goals?**

Response:

The Department of State is no longer a suitable location for the Bingo-Raffle program. The Department must rely on external law enforcement agencies to perform comprehensive

investigations. The Department of Revenue, already charged with overseeing lawful gaming in the state, seems to be the appropriate location for this program. The Department's compliance investigators are hampered by weak enforcement ability which limits their ability to compel compliance. Agencies like the Department of Revenue are better equipped to provide strong enforcement of gaming laws. Strong enforcement ensures statutory and rule compliance and better reporting practices among bingo-raffle licensees.

Effective implementation of the Address Confidentiality Program, which resulted from 2007 legislation, has been stunted because revenues to support the program have been slow in coming in to the Judicial Department, who collects the fees and then transfers them to the Department of State. Based on Judicial's revenue projections for this program, the Department hired one FTE to develop and launch the program because it is to begin accepting applications in July 2008. However, unless revenues increase significantly over the next several months, this program is in jeopardy of continuing as was mandated. This program should be moved to either the Judicial Department or the Department of Public Safety.

Even though the oversight of statewide Disaster Recovery facility by our department is effective, this program should be moved to either the Governor's Office of Information Technology or the Department of Personnel and Administration.

1:50 – 2:00

Costs and Savings from Complying with Specific Bills and Orders

- 7) What are the Department's anticipated costs, anticipated savings, and potential benefits from complying with Executive Order D 028 07, Authorizing Partnership Agreements with State Employees?**

Response:

According to the Executive Order, it is not binding on elected officials, and the Secretary of State is not planning to follow it.

The Executive Order states that its purposes are to engage employees so they become more positive and productive contributors and to facilitate collaboration among managers and employees to achieve jointly crafted workplace goals and expectations. The Secretary of State shares these goals, and believes that effective leadership can promote the goals without a formal and divisive structure that requires the negotiation of "partnership agreements" with outside labor organizations.

- 8) Provide an estimate of the costs your department will incur in FY 2007-08 in carrying out the provisions of H.B. 06S-1023. Provide an estimate of your department's savings in FY 2007-08 as a result of not providing services to individuals who are in the country illegally.**

Response:

H.B. 06S-1023 only affected our notary program. Our existing notary application form was modified to include the affidavit of status as part of the affidavit that notary applicants already have to swear to and sign before another notary public. Applicants now have to send a photocopy of one of the four types of ID described in H.B. 06S-1023.

There are no significant costs for the implementation of H.B. 06S-1023, and there are no significant savings. Historically, almost 100% of notary applicants are U.S. citizens; the few remaining applicants are legal residents.

2:00 – 2:20

Decision Items

9) Explain the Secretary's rationale to replace the Department's cash funds with General Funds for the costs of both elections and the voting systems certification program.

Response:

Prior to FY 1983-84, the Department's costs of administering elections were funded from the General Fund. In 1983, with the passage of the 1983 Long Bill, the General Assembly replaced General Fund support with appropriations from cash funds collected as fees from commercial filings. It is believed that the Joint Budget Committee initiated the change in funding to cash funds because of the "Kadlecek amendment", which was a statutory limitation on General Fund appropriations enacted in 1977 (prior to the enactment of the Arveschoug-Bird limitation in 1991).

There are several reasons why the Department is raising the issue of funding sources for elections at this time:

- a. HAVA funds will be exhausted as a funding source within the next several years, at which time state funds will be required to continue support for HAVA-related election activities. The General Assembly needs to consider now how it will manage the depletion of HAVA funds as a funding source for elections.
- b. The use of HAVA funds to support the cost of the voting system certification program has come into question. With the costs estimated to exceed a million dollars a year, the State may be at risk under HAVA if it continues to use HAVA funds for this purpose.
- c. The Department is concerned that the current system of funding elections through fees is putting the State at risk of legal challenge. At the present time, the Department is required to set business filing fees at a level that covers (1) the cost of providing the services associated with such filings, plus (2) an additional amount sufficient to cover the Department's costs relating to elections. However, this requirement raises constitutional and statutory issues. For example, in *Bloom v. City of Fort Collins*, 784 P.2d 304 (1990), the Colorado Supreme Court invalidated a similar funding mechanism, stating that "a service fee must be reasonably designed to defray the expenses for the particular services for which the fee is imposed" and

that fees in excess of that amount would constitute an invalid attempt to authorize revenues for the purpose of defraying general governmental expenses unrelated to the purpose for which the fee was collected. A lawsuit against the State challenging cash funding of elections could be expensive, especially if the lawsuit resulted in a judgment against the State that required that cash funds previously used to support elections had to be reimbursed by the General Fund.

The Department's business filing fees will need to be increased in the current fiscal year because expenditures from the Department of State Cash Fund are exceeding current revenues. Fiscal year expenditures are projected to exceed the fund balance by approximately \$650,000, an amount that will have to be made up by fee increases. Fees would not need to be increased if the Cash Fund were not required to support election activities.

10) Does the Department plan to work with the Governor's Office of Information Technology to implement its Cyber-Security plan (DI#2)?

Response:

Yes. The Secretary of State's Office has created its agency Cyber Security Plan pursuant to procedures outlined in statute as well as in rule by the state Chief Information Security Officer (CISO) and the Governor's Office of Cyber Security (OCS). This activity has also been performed under the guidance of the Governor's Office of Information Technology (OIT) and the State Chief Information Officer. The Department fully expects the implementation of the Cyber Security Plan outlined in our Decision Item #2 to move forward in collaboration with the OCS and the OIT.

11) Will the Department's requested accounting system (DI#3) be compatible with other agencies? Does another agency have a system that the Department of State can utilize?

Response:

The Department will definitely make interoperability and data interchange functions a core requirement of a replacement accounting system. Compatibility of the Department's selected replacement with existing state financial management systems should come about naturally as a result of a full evaluation and selection process for which the Department is requesting funding in this Decision Item.

The Decision Item is focused in addressing the agency's need to replace its accounts payable and accounts receivable system, and ensuring that this system is replaced with a system that is sustainable and capable of exchanging this daily AR/AP data with other systems in the office and the state. The Department has investigated systems in use at other agencies in the state and believes there may be an opportunity for the use of the same type of system, although the Secretary of State's needs differ substantially from some other state agencies' needs. Some aspects of financial management will not be addressed through this decision item, such as comprehensive budgeting, daily reconciliation of budgeted versus actual expenditures, tracking

of budget allocations, management approval of large expenditures, etc. Such functions will continue to be supported by the Colorado Financial Reporting Systems (COFRS) and agency finance staff.

There are significant areas of functionality in COFRS and other large-scale accounting systems which the Department is not attempting to address through this decision item: physical inventory tracking and management; supply chain monitoring; labor data collection and tracking; grant management; cash management; federal and state tax filing; and fixed asset tracking functions all lie outside the core requirements for what is essentially a point of sale system.

12) How did the Department arrive at the estimated cost of the accounting system? Is it enough to acquire a quality system?

Response:

The Department conducted a feasibility study by interviewing vendors with offerings in the enterprise resource planning and accounting systems arena. We received estimates of cost by researching some of the common systems in use for government and mid-market entities (SAP, Oracle PeopleSoft, Sage Software, Microsoft Great Plains, and Compiere) for accounts payable/accounts receivable systems, and also by assessing the costs for developing such a system using State resources. We believe, based on the requirements as described in this response and the response to Question 11 above, that the request represents a reasonable estimate to procure and implement a quality system.

13) What will the requested FTE do after the voting systems are certified (DI#4)? Why didn't you request these FTE for voting systems certification last year?

Response:

One issue facing the voting systems staff is the fact that voting systems can be certified at any time during a given year. Two vendors have indicated they will be submitting a second system for certification in 2007. The voting systems staff is also responsible for ensuring, training and maintaining requirements both pre- and post-election. The full impact of these requirements makes up the Department's "holistic" approach to voting system security. These duties include items such as:

- Administering post-election audits as required by Section 1-7-415, C.R.S.;
- Support for county user acceptance testing of voting systems;
- Installation and auditing of trusted build requirements (which include re-installations based on maintenance needs);
- Audit of county maintenance records for voting systems;
- Support for mandated county logic and accuracy testing;
- Administration of county security plan requirements (approval of plans, etc.), per Rule 43.
- Training of county clerks and staff.

The use of three FTE's to complete the certification process in 2006 was a stretch of resources but was sufficient. In March, when rulemaking was complete and the 2007 process was fully designed and launched, it was obvious that additional resources were necessary. We did not receive applications for certification until early April. With no history or experience from which to draw, the Department had to develop and compile staff requirements during the process, and was well into the process before the needs became clear. Until late spring of this year, we were also operating under the assumption we could fund this program with HAVA dollars.

2:20 – 2:30

Help America Vote Act (HAVA)

14) When Help America Vote Act (HAVA) funds run out, will the Department continue to implement any HAVA-related projects? If so, who will fund them? Has the Department sought an opinion on whether HAVA funds, if General Funded, could be exempted from the Arveschoug-Bird limit?

Response:

HAVA mandates ongoing activities even after the HAVA funds run out. The most expensive required activity will be maintenance and operation of the statewide voter registration system (SCORE), which may cost approximately \$1.4 million annually. In addition, there are other activities that HAVA either requires or encourages, including the following:

- Educating voters concerning voting procedures, voting rights, and voting technology;
- Training election officials, poll workers, and election volunteers;
- Providing information to voters in the polling place;
- Implementing provisional voting;
- Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing non-visual access for individuals with visual impairments, and providing assistance to Native Americans and individuals with limited proficiency in the English language;
- Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.

The Department proposes in Decision Item #1 that such costs should be supported by the General Fund.

Pursuant to section 24-75-201.1 (1) (a) (III), C.R.S., the Arveschoug-Bird limitation on state general fund appropriations does not apply to:

- Any state general fund appropriation which, as a result of any requirement of federal law, is made for any new program or service or for any increase in the level of service for an existing program beyond the existing level of service. Thus, it may be possible to exempt HAVA-related general fund appropriations from the limit.
- Any state general fund appropriation which, as a result of any requirement of a final state

or federal court order, is made for any new program or service or for any increase in the level of service for an existing program beyond the existing level of service. Thus, it may be possible to exempt general fund appropriations for the increased cost of voting system certification required by the *Conroy* decision from the limit. (Decision Item #4.)

15) In the briefing packet, on Appendix B, why are there still balances to be paid to the counties? What happens to these funds if the counties do not use them?

Response:

Allocations of HAVA funds for reimbursement of the costs for counties to purchase HAVA-compliant voting equipment were based on a formula to assure equitable distributions to all counties. Each county determined its own equipment needs, selected its equipment vendor, and made purchases accordingly. Some counties replaced entire systems and some augmented what they already had in place. To receive their allocations, counties submitted itemized invoices for their purchases and the state distributed the funds to them. Twenty counties have funds remaining in their allocations because either (1) they did not make purchases equal to or greater than their allocation, or (2) they have not submitted invoices for reimbursement of their purchase costs. [The largest allocation was made to Denver, who recently requested reimbursement; this payment is in process.] The intergovernmental agreements with the counties are effective through December 31, 2010, so that, theoretically, the remaining allocations could be requested by the counties through that date. However, per the agreement, payment of any HAVA funds is contingent upon the availability of funds, and if the remaining funds are needed elsewhere by the Department for the implementation of HAVA prior to counties requesting them, the funds could become unavailable to the counties who have not utilized their full allocation. Undistributed allocations at the end of 2010 would be used in the implementation of other HAVA activities or requirements.

16) Explain the current status of the State of Colorado Registration and Election System (SCORE). What is the roll-out timeline, and will it be ready for the 2008 primary and election?

Response:

The SCORE system is on schedule, and it will be ready for the 2008 primary and general elections. The system was deployed to nine pilot counties (Alamosa, Arapahoe, Chaffee, Conejos, El Paso, Elbert, Gilpin, Larimer and Park) in August 2007 after a pilot county mock election exercise and was used for the conduct of the November 2007 election. Seven pilot counties conducted mail ballot elections and two (Conejos and Gilpin) conducted vote center elections with in-person early voting as well. Some county users of the system did experience minor issues on Election Day, and the system developer, Saber Corporation of Oregon, and staff of the Department reacted quickly and appropriately. The counties have been successful in using the SCORE system to support election activities leading up to, during and after Election Day.

The post-pilot county statewide roll-out will commence in early December 2007 and is scheduled

for completion in late March 2008. Saber has been performing automated tests of the system to ensure that SCORE will handle the load of General Election activities, and the Secretary of State has also hired an experienced outside software testing firm to perform independent performance and stress testing. These automated tests will continue even during and after the statewide deployment. After the statewide deployment is complete, two mock election exercises are anticipated in April and May of 2008, to ensure the system is fully ready for use in the 2008 election cycle. These mock election activities will be used not only to validate readiness of the SCORE system itself for Primary and General Election activities, but should also identify areas where refresher training or more focused training of users is needed. The phased roll-out approach provides the best opportunity for rigorous acceptance testing, intensive training of local election officials, data validation and verification and county site visits to ensure the readiness of SCORE for county and state activities in 2008.

The success of the SCORE system will only be possible through the continued dedication of county and state officials and the ability of Saber staff to fully address Colorado's needs as the system is deployed across the state. The steady and willing participation of county stakeholders (requirements gathering, devoting a week each month for formal and informal training sessions during nearly every month of the past calendar year) and the proven experience of Saber (which has provided HAVA-compliant systems in ten other states and is currently engaged in three other states including Colorado) have been critical factors in Colorado's approach to achieving compliance with state and federal law regarding a statewide voter registration and election management system.

Some observers of the SCORE system have questioned "Why is the system an election management system (EMS) and not merely a voter registration list?" That is a good question, and there are multiple reasons for this approach:

- An analysis of the possible approaches to meeting the HAVA requirement for implementing "...in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained and administered at the State level..." (42 USC 15483 303 (a) (1) (A)) was conducted, twice, by the Department. In both analyses, by two prior secretaries of state, the benefits of a centralized Voter Registration and Election Management System (VR/EMS) were deemed to outweigh the benefits of a system which merely verified voter eligibility and maintained a centralized list of verified voters;
- The competitive procurement process to select the system integrator thus focused on this approach. The two finalists in the evaluation each provided references for a half-dozen states that chose the same VR/EMS approach. A different approach would required a contract change between the State and Saber;
- A VR/EMS system allows the state to provide many capabilities that are not possible with a VR list. Among them are: electronic poll book capabilities; real-time voter eligibility checks; real-time ballot status checks; real-time resolution of voter moves from county to county within the state; and, verification of statewide and multi-county petitions;
- A VR/EMS system also allows greater visibility to the State in overseeing the conduct of

voter registration and election activities in real-time. The time lag inherent in the collation and analysis of voter and elections information from disparate, isolated county-based EMS systems diminishes the potential for effectiveness in carrying out the duties of the Secretary as the chief election official of the State;

- A VR/EMS system is likely to be less expensive for the State as a whole. When the State is providing a centralized, consolidated system which performs the full range of election management functions, counties will no longer have to expend monies on separate VR/EMS systems;
- County-based systems in use today do perform VR/EMS functions. The State purposely chose to emulate the approaches currently in use in Colorado in determining the scope of the SCORE project;
- Support for at least one of the VR/EMS systems in use in Colorado, e.g., Sequoia's Integrity System, is being eliminated by Sequoia at the end of this year;
- Counties can, if they deem it necessary, still perform some EMS functions, whether they undertake to do so with county staff or through outside vendors. While the aim of the Secretary is that SCORE will provide every function needed for counties to effectively manage voter registration and election activities, it is unlikely to satisfy every conceivable desire. Some counties already have well-tested electronic poll books, sophisticated voter education web sites and other rich capabilities. Counties can extract information from the SCORE system in real-time to satisfy these needs, without compromising the benefits available through a centralized system. Even though counties may use their own system for EMS purposes, not using SCORE EMS functions would impair fully participating counties, particularly where election activities cross county borders.

The SCORE system has evolved a great deal from the inception of the Department's effort to achieve HAVA compliance in this fashion, and will continue to evolve as we progress from nine pilot counties to sixty-four counties, from pilot activities through performance and stress testing and mock election exercises, and from November 2007 to April, August and November 2008.

17) Does the Department of State give funds to the other departments it works with to implement SCORE? If so, will it continue to do so after HAVA funds are exhausted?

Response:

The Department provides limited funding to other state departments as part of the state's and counties' responsibility to use the SCORE system to verify the eligibility of potential voters. Three state agencies are responsible under law for providing information for this purpose: the Department of Corrections (CDOC) provides records of felon status; the Department of Public Health and Environment (CDPHE) provides information on deceased individuals; and the Department of Revenue (CDOR) provides information both on Colorado driver's license and state ID holders as well as serving as the conduit for verification of Social Security numbers with the Social Security Administration. The Department estimates its costs related to information from these three agencies will total approximately \$9,160 annually (CDOC - \$0; CDPHE -

\$2,160; CDOR - \$7,000) after the full implementation of SCORE. Such costs are defined and reimbursed pursuant to state Interagency Agreements.

The Department will continue to incur these costs on a perpetual basis even after HAVA funds are exhausted. The responsibility of the four state agencies to coordinate information to assist in verification of the eligibility of potential electors is not contingent on the use of federal funds to support the expenditure, but is state and federal law. Based on the limited financial burden this places on the Department, it is not anticipated to pose a significant hardship to our agency or the other affected state agencies.

2:30 – 3:00

Voting Systems Certification

18) What are the differences between Rule 43 and Rule 45? How did the Department develop these rules?

Response:

Rule 43 concerns “County Security Procedures”. Rule 43 establishes requirements that county clerks must follow to ensure the physical security of voting equipment. Section 1-5-616 (5), C.R.S., requires county clerks to establish security plans “to ensure the accuracy and security of voting” and to submit the plans to the Secretary of State for approval. The Rule establishes requirements such as tamper-evident seals, chain-of-custody logs, video surveillance cameras, temperature-controlled storage, locking doors and vaults, and security training for election judges.

Rule 43 was in place prior to the Court’s decision in the *Conroy* case last year, but the Court found that the Secretary’s requirements did not “adequately require all counties to provide appropriate minimum security at the county level”. Therefore, under the supervision of the Court, the Secretary of State established enhanced standards prior to the November 2006 election and reviewed county security plans prior to the 2006 General Election in accordance with the enhanced requirements. Subsequently, the Secretary modified the enhanced requirements based on county feedback and incorporated the modified requirements into a proposed amended version of Rule 43. The proposed revision was published on March 16, 2007, and the Secretary held a public hearing on the proposed Rule on May 1, 2007. After considering public testimony, the Secretary adopted a revised version of the proposed Rule on May 30, 2007.

Rule 45 concerns “Voting System Standards for Certification”. Rule 45 establishes procedures and standards to be followed by vendors and the Secretary of State’s Office for the certification of voting systems. As required by section 1-5-616 (1), C.R.S., the Rule establishes minimum requirements for the following:

- (a) Functional requirements;
- (b) Performance levels;
- (c) Physical and design characteristics;
- (d) Documentation requirements;

- (e) Evaluation criteria;
- (f) Audit capacity;
- (g) Security requirements;
- (h) Telecommunications requirements; and
- (i) Accessibility.

In order to draft a revised Rule 45, the Office solicited the assistance of experts to identify specific security risks and define testing/certification requirements. The panel of experts included state and private sector IS/IT professionals, computer scientists, and university professors. This group of experts held meetings on December 1 and December 12, 2006, and January 8 and January 19, 2007.

The Secretary of State held two public hearings on the proposed Rule -- an informal public hearing on January 16, 2007 and a formal rulemaking hearing on February 6, 2007. Following the February 6 rulemaking hearing, the Secretary held the record open for twenty days to allow for the submission of additional public comments on the proposed rules. On March 16, 2007, after reviewing the public comments received, the Secretary of State adopted the final rule.

An important overlap between the two rules in general is that the development, recommendations and complete understanding of the voting devices used in the state is generated from processes in certification (Rule 45) and deficiencies discovered in the systems can be overcome by procedures applied through county security procedures (Rule 43).

It is also important to note that in the development of both Rule 43 and Rule 45, the Department worked very closely with the Attorney General's Office to ensure that the rules met the level of security required by state law and the Court's decision in the *Conroy* case, without going beyond those requirements and imposing unnecessary burdens on the counties and voting system vendors.

19) Describe the Department's policies for communicating with counties. Are these policies different in regards to voting system certification?

Response:

The Secretary of State considers county clerks to be partners in ensuring successful elections in Colorado, and the Secretary strongly believes that effective communication is critical to the success of that partnership. Thus, it is the policy of the Secretary of State to communicate in as many ways as possible to carry out our duties effectively.

The Department continues to communicate regularly and intensively with county clerks through many different means, including:

- Responding to questions and problems. The Elections Division receives daily inquiries from clerks' offices on election questions and problems. The Department's policy is to respond promptly and helpfully.

- Training and education. The Elections Division conducts regular training programs around the state for county clerks and their staffs. These programs provide an opportunity to learn about county clerks' questions and problems and to provide feedback and assistance.
- Joint committees. Staff from the Secretary of State's Office participates jointly with county clerks and their staff in numerous committees, such as the clerks' Election Statute Review Committee, the clerks' Forms Committee, and the Election Official Interjurisdictional Committee.
- Newsletters and special alerts. On a near weekly basis, the Elections Division issues a brief newsletter to county clerks providing current information about elections. The Division also issues periodic special "Alerts" to provide guidance on special topics of interest.
- Clerks' Corner. The Department's web site includes a special "Clerks' Corner" for county clerks. The Clerks' Corner is regularly updated and provides a wealth of resources for county clerks, including contact information, training plans, calendars, etc.
- SCORE Project. The Department is working very closely with many county clerks to develop and deploy the statewide voter registration system. This joint effort requires especially intensive efforts at communication, which include the following:
 - Clerks' Corner. The Department posts detailed information about SCORE on the SCORE section of the Clerks' Corner. This section provides a means by which clerks can ask questions about the SCORE project, as well as provide feedback to us.
 - SCOREBoard. The Department provides information on SCORE to all counties via the SCOREBoard newsletter.
 - Meetings and conference calls. The Department maintains a very rich and frequent dialog with pilot county representatives and change control board members over the past several months, including frequent teleconferences and meetings. There are nine pilot counties, and representatives of the City and County of Denver have regularly participated in change control board activities along with about a dozen other counties from across the state.
 - Steering Committee. The Department established and utilizes a Steering Committee, which has four representatives from the counties and three representatives from the Department. The Steering Committee meets on a monthly basis to provide the opportunity for discussion, comments, and questions, and to give guidance to Saber and our office.
 - "Ask Saber". Saber hosts a weekly "Ask Saber" phone conference, which is open to any Colorado county to ask questions about the status of the SCORE project.

The only area in which the Secretary of State has intentionally limited communication is the current process of retesting of voting systems.

As you know, the retesting is being conducted pursuant to the Court's order in last year's *Conroy* case, after litigation brought by plaintiffs who oppose the use of any electronic voting systems.

Since the retesting process began last April, the Department has received requests from county clerks, as well as from vendors, voting system activists, and the press, to be involved in various meetings and discussions about the conduct of the process. The Department understands the

interest on the part of these groups for more information about the status of the process. In particular, the Department recognizes the critical importance to county clerks of the outcome of the process.

New litigation challenging electronic voting has been initiated, and more litigation is anticipated after the current certification process is completed by plaintiffs who are opposed to any electronic voting systems. In order to defend successfully against such litigation, it is critical that the Secretary's decision whether to recertify voting systems be based only on the documented results of testing the systems in accordance with the standards and processes established by statute and rule, without any other influences that might be alleged to compromise the process.

The possibility that litigants might allege improper influences is well-founded. In last year's litigation over the certification process, plaintiffs alleged that the Secretary of State's certification of one system was improperly influenced by political pressure from a county clerk's office. Fortunately, the Judge ruled, "In this case, there is insufficient evidence to establish that the Secretary's decisions to certify the DREs were based primarily on political pressure, and the court, therefore, declines to find the Secretary's actions to be arbitrary and capricious."

To ensure that the retesting process is legally defensible, the Secretary has implemented greatly improved procedures to ensure that the process is thorough, open, well-documented, and absolutely fair to all vendors and our citizens.

Furthermore, in order to meet the information needs of county clerks as much as possible, as well as respond to the information needs of activists, the press, and other members of the public, the Department has posted a large amount of information on its web site. The Department urges interested persons to visit the web site for information about the recertification process at:

<http://www.elections.colorado.gov/DDefault.aspx?tid=113>

(Then click on "Colorado's Voting Systems Certification Program")

20) Define "substantial compliance" as the term applies to voting system certification.

Response:

The term "substantial compliance" is the standard established by the General Assembly for the administration of the state election code (see sections 1-1-103 (3) and 1-1-113 (1), C.R.S.). Election Rule 45.3.2 incorporates this statutory standard for the functional testing portion of the certification process. The General Assembly has not provided a definition, but the courts typically apply a three-part test to determine "substantial compliance": (1) the extent of noncompliance; (2) the purpose of the provision violated; (3) the good faith efforts to comply. *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996).

21) Explain how Colorado's voting systems certification is different than federal certification. What are the added benefits of state-level certification? Is it trying to address deficiencies in the federal certification program? Does federal law require that voting systems used in federal elections be federally certified?

Response:

Federal law does not require that voting systems used in federal elections be federally certified. HAVA requires the federal Elections Assistance Commission (“EAC”) to accredit voting system testing laboratories to conduct testing under voting system standards adopted by the EAC. However, states are not required to adopt the federal voting system standards, and for this reason the standards are designated “Voluntary Voting System Guidelines”.

State level certification has been designed with three main goals in mind:

- 1) Provide balance to federal testing where possible. We have evidence of federal testing not being conducted adequately or in some cases at all. Where these deficiencies exist, state certification is designed to flesh those out and either require the federal testing to be completed, or in cases where possible be conducted by state staff. On the flip side, as the quality (and proof) of the federal testing process increases, the state certification process can be greatly reduced. Although most states rely solely on federal certification by the EAC or NASED, the implementation of our security requirements has suffered due to delays by the EAC in adopting standards and overseeing the process of voting system testing. HAVA was enacted in 2002 and required standards, but federal certification was not really begun by the EAC until this year.
- 2) Evaluate and examine Colorado-specific functional requirements. State level testing ensures compliance with Colorado-specific election requirements that are not currently addressed through the federal testing, such as write-in candidates, primary election components, recall elections, multi-party questions, ballots containing a large number of initiatives, precinct splits and district combinations;
- 3) Create a vendor specific baseline model. The 2007 process is very thorough, with the anticipation that the process would create a solid baseline of tests that could be relied on for incremental testing in the future. As a vendor makes small changes to the system, only those specific changes would be tested again. In essence, future packages submitted by vendors should decrease the amount of tests conducted by staff.

Aside from the state-specific functional requirements, the additional benefits of state certification have great impacts on typical electronic voting issues. First, one output of the testing process is the trusted build of voting system software. For the first time, the Department will be able to provide not only assurance but **proof** to anyone if voting system software has been changed should an issue arise. Through the certification process, the Department is also in a position to provide valuable guidance and requirements to county election officials on how to securely handle, store, transport, and operate the voting equipment from an independent source (i.e., not from the voting system manufacturer).

Additionally, our state certification testing requires processing of actual ballots filled out by humans that contain all of the Colorado specific requirements. Federal testing currently involves

“simulated voting”, which requires attaching a computer to a ballot processor for proof of outcome. Processing human-voted ballots that are folded, flat, and ensuring that ballots can be counted correctly similar to field environments, provides for a higher confidence that the equipment will perform in Colorado counties with accuracy rates similar to those discovered in testing.

Finally, as an overall piece of the election cycle process, the certification process ensures that manufacturers and their documentation support use of the voting system under Colorado requirements for pre-election, election day, and post-election events. As many counties rely heavily on the vendor documentation and support, our certification process requires validating vendor documentation against election use, and gives training for the manufacturer staff on Colorado processes.

22) Are certain statutes negatively impacting the voting system certification process? What are the Secretary’s recommendations for changing them?

Response:

Various statutes governing voting systems certification, use, and purchase are confusing and internally inconsistent. Those statutes include section 1-5-601.5, section 1-5-612 (2), and section 1-5-613 (2). Some of the questions that have arisen concern are:

- May county clerks continue to purchase previously certified voting equipment after the federal 2005 Voluntary Voting System Guidelines take effect on December 13, 2007?
- Under what circumstances may county clerks continue to use voting systems purchased prior to the effective date of the 2004 certification statute, May 28, 2004?

Thus, the governing statutes need to be clarified.

In addition, as reported by JBC staff to the Committee, Colorado’s statutes are relatively detailed and prescriptive, which makes it more difficult for the Department and counties to adjust to changing circumstances, such as the *Conroy* decision.

More importantly, it is time to revisit the role of state certification in light of improving certification at the federal level. The state certification program, as it exists under current state statutes and court order, is an expensive and time-consuming process that makes it nearly impossible for county clerks to plan and acquire the necessary resources to conduct successful elections. As the federal certification process continues to be strengthened, the General Assembly should consider limiting the role of state certification to ensuring compliance with Colorado-specific requirements.

23) Is it possible to certify the voting systems in time for the 2008 elections? What is the “drop dead” date for certification that will allow enough time for the vendors to deliver the equipment to the counties, the Clerks to train local elections staff, etc.?

Response:

The equipment being evaluated currently will be the software and hardware used in the 2008 election. The vast majority of this equipment is the same that the counties used in 2006 and 2007 elections. With the exception of systems (or parts of systems) that might be decertified in 2007, very few counties will need additional equipment and, more importantly, additional training.

Without knowing the outcome of the current review of systems, the Department cannot yet determine the impact of how many counties and which counties will require a change in some or all of their voting equipment.

The Department fully expects to complete this process and make announcements the week of December 11, which will provide time for the Department to work with counties and the General Assembly on solutions if any voting system is decertified. However, it will be critical for all involved to work quickly and with an appreciation of the urgency of the situation.

In 2006, when all counties required additional equipment and/or changes in manufacturers, the vendors met delivery and training schedules (while servicing many other states), and counties ordered equipment as late as May of that year.

- 24) In FY 2007-08, the State appropriated \$1.7 million to help counties offset the costs of having statewide initiatives and referendum on their ballots. Since there were no statewide issues in 2007, are these funds still available? Could some of these funds be used to help counties replace decertified systems or to purchase additional certified equipment for the 2008 elections? Are any other sources of funding available for these purposes?**

Response:

The \$1.7 million in funds was specifically appropriated in FY 2007-08 for reimbursement to counties for elections if there were state ballot issues; it will be unexpended for that purpose and will remain in the Department of State Cash Fund. However, because the Department's Cash Fund is projected to be exhausted during the current fiscal year unless there are fee increases, these funds are needed to reduce the size of the fee increases.

The Department is not aware of any other source of funding. Remaining HAVA funds are budgeted for the Voter Registration System and implementation of other HAVA activities.

- 25) If a vendor is decertified, what are a county's options? What can the Department or General Assembly do to help a county whose vendor is decertified to conduct an election in 2008?**

Response:

The Secretary has been working internally and with county clerks and legislators on an

aggressive schedule to organize a post-recertification task force to develop solutions if voting systems are decertified.

Available options will partly depend on which systems might be decertified. Some of the options for consideration include the following:

- a. *All mail ballot with optical scan counting* (either mandatory statewide or county option).
Potential issues: (1) This option will not be a solution if the optical scan system is decertified. (2) HAVA requires an accessible DRE for disabled voters in each location where voters are permitted to drop off ballots.
- b. *Polling place election using paper ballot and optical scan counting* (either mandatory statewide or county option).
Potential issues: HAVA requires an accessible DRE in each polling place. If county's DRE is decertified, could the county utilize another county's DRE system that was not decertified?
- c. *Paper ballot with hand counting*..
However, HAVA requires an accessible DRE in each polling place.
If county's DRE is decertified, could the county utilize another county's DRE system that was not decertified?
- d. *General Assembly suspends the SOS recertification decision and rely only on federal certification.*
- e. *General Assembly allows decertified equipment with specified remedial or corrective action.* For example, increase the post-election audit from 5% to 10%. Corrective action would depend on the reason(s) for decertification.

26) Explain the Secretary's position on mail-ballot only elections. Is this an option to resolve the current certification concerns? What are other options?

Response:

The Secretary personally opposes mail ballot elections for several reasons:

- Because voting in mail ballot elections takes place in family and residential settings, mail ballot elections provide less privacy in voting and less protection against voter intimidation.
- The current system provides voters with a choice of voting either in person at a polling place or by mail by means of absentee ballot.
- Colorado's voters turned down the proposal for mail ballot elections in 2002 (Amendment 28).

Nevertheless, if the General Assembly chooses this option, the Secretary will work to make it the best possible system for county clerks to conduct successful primary and general elections.

Other options that could be considered are listed in the answer to question number 25 above.

27) If the Legislature changed statute to permit a mail-ballot only election in 2008, should county participation be optional or mandatory? What elements, both statutory and mechanical, are required to prepare for the potential of an all-mail ballot election?

Response:

The Secretary generally opposes having a mail ballot election available as an option. However, he could accept, on an emergency basis for the 2008 election, counties that have their equipment decertified to do an all mail-in ballot election if that is the only realistic solution available to them. But it would certainly not be a preferred solution.

One potential concern about a county option to conduct a mail ballot election is that it might affect turnout compared to counties that conduct polling place elections; this could skew the election results. However, this is less of a concern in a presidential election year such as 2008, where there is no incumbent, because turnout will likely be very high in every county regardless of the method of voting.

There is an important potential problem with mail ballot elections as a remedy in 2008. Mail ballot elections require optical scan devices to count the votes (assuming votes are not hand-counted). Optical scan devices are part of the voting systems that the Department is currently retesting, and it is possible that optical scan devices will be decertified. (On the other hand, if a county's voting system is decertified, then that county might be able to go to another vendor whose system is not decertified and lease or purchase an optical scan system for a mail ballot election, which would be cheaper than acquiring DREs from another vendor for a polling-place election.)

The Department will work with Legislative Legal Services to draft appropriate statutory language to prepare for the potential of an all-mail ballot election if the General Assembly chooses that option.